IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO.8964 OF 2004

Sharmila Prasad Datar, .. Petitioner

Vs

Prasad Madhav Datar, .. Respondent

Mr. P.K.Dhakephalkar with Mr R.M.Patne, for the petitioner.

Mr Y.S.Bhate, for the respondent.

CORAM : D.B.BHOSALE,J.

DATE : 17th December, 2004.

PC:

1. Rule. Returnable forthwith. Mr Bhate, learned counsel for the respondent, waives service. by consent of the learned counsel for the parties, Rule is heard finally.

2. This petition is directed against the order dated 25.8.2004, rendered by the Principal Judge, Family Court, in Interim Application No.98 of 2004 in Petition No.D-41 of 2000. The main prayers made by the petitioner, in that application, read thus:

> "(a) That this Hon'ble Court be pleased to reconsider my Application dated 12th April, 2004

(Exhibit-61) in the proceedings on merits,

(b) That pending the hearing and final disposal of the Application the operation of the order dated 20th April, 2004 and the subsequent order dated 29th June, 2004 be stayed.

In short, the petitioner prayed for reconsideration of Exhibit-61 and for setting aside the order dated 20.4.2004 passed below Exhibit-61. The learned Judge refused both the prayers made in the application. The order dated 20.4.2004 reads thus:

"The Respondent has prayed to stop the overnight access of the minor son Soham to the petitioner or in the alternative to hand over the custody of the son to the petitioner.

2. The petitioner is ready and willing to take the custody of the son Soham but is not ready to stop the overnight access.

3. The respondent has prayed that if the custody is given to the petitioner, she should be granted access on every working Saturday in the children complex of this Court in the evening from 3.30 p.m to 5.30 pm and her parents and sisters should be allowed to meet the son, for which the

petitioner is agreeable. He has also stated that he has no objection even for giving overnight access to the respondent.

4. In such circumstances, I feel that the custody of the son should be handed over to the petitioner and the respondent should be given access on every working Saturday from 3.30 pm to 5.00 pm in the Children Complex of this Court.

. The date, time and the place of handing over the custody, may be decided mutually by the parties.

. The respondent shall also be entitled to overnight access if she desires."

The interim Application No.98 of 2004 was rejected vide order dated 25.8.2004. The petitioner in the present petition has prayed for setting aside the order dated 25.8.2004 whereby the Family Court has refused to reconsider the application Exhibit-61 and the order passed therein.

3. The factual matrix that would be relevant and material for considering the question raised in the writ petition, in brief, is that the petitioner-wife was married to respondent-husband on 27.5.1998. They have a

son Soham, now aged about 5 yrs. He was borne on 15.5.1999. They along with the respondent's parents were staying at Prabhadevi till 22.9.1999. Admittedly, the respondent's parents are 77 and 74 years old. It appears that there were serious differences between the petitioner and the respondent which, according to the petitioner, forced her to leave the matrimonial home on 22.9.1999 along with Soham and since then she has been staying at Borivli along with her parents. The petitioner and the respondent both are working. The respondent is working in Reliance Energy, while the petitioner is working in State Bank of India. The respondent filed Petition No.D-41 of 2000 for permanent custody and other reliefs as prayed for therein. Another petition was filed by the respondent bearing No.A-798/2002 for dissolution of marriage. The petitioner also filed Petition bearing No.C-29/2002 for maintenance and another Petition No.D-2003 for permanent custody of Soham. All the four petitions are pending before the Family Court. It appears that in November 2000, the Family Court gave two hours access of son Soham to the respondent on every alternate Saturday. In October, 2002 he was given overnight access during Diwali and Christmas vacations, and in Summer vacation of 2003. From 14.1.2003 the respondent was given

overnight access on every alternate Saturday and Sunday and that continued until the petitioner filed an application Exhibit-61 in which the impugned order dated 20.4.2004 was passed. According to the petitioner, after the overnight access of the son Soham from Friday 9th April to Sunday 11th April 2004, when he was brought back by the respondent to leave him at her house, she noticed that he had severe burn injury on his legs and when she enquired about it with the respondent, he, instead of telling her anything picked up Soham and went to Borivali Police Station. I do not deem it necessary to state what happened thereafter. As a result of the said incident and past experience, the petitioner seems to have filed the application Exhibit-61 on 12.4.2004. The official translation of the concluding paragraph in Exhibit-61 application reads thus:

> "In order to anyhow stop the sufferings of my son and dishonesty on the part of Datar, I hereby earnestly pray your honour that directions may be given to stop the overnight access and to grant only two hours access to Datar as earlier, otherwise I would not be left with any other option but to hand over Soham into the custody of Datar in order to stop the sufferings of my son.

> However, this does not mean that I have given permanent custody of Soham to Datar and it also does not mean that I am unable to look after Soham.
>
> . I, therefore, earnestly pray Your Honour that some concrete decision may be taken in this regard immediately."

On the very day, the petitioner was directed to make an endorsement in her handwriting as to what she exactly desired in the matter. Accordingly, the petitioner made the following endorsement (Exhibit C-1):

> "If the Hon'ble Court takes a decision to give the custody to the petitioner then, I may be given access of my son on court working Saturdays during the period from 3.30 pm to 5.30 pm in court building (child complex). If my mother, father and sister wishes to meet the child then, they may be permitted to meet him in court complex.
>
> . This statement may be treated as supplement to my application dated 12.4.2004."

4. According to the petitioner, the learned Judge of

the Family Court misread and/or misinterpreted her prayer in the application Exhibit-61 and her endorsement Exhibit-C-1 and passed the order dated 20.4.2004 without considering her prayer to stop the overnight access given to the respondent and grant two hours access as earlier. Hence, the petitioner had approached this Court by way of Writ Petition No.4196 of 2004 and prayed for quashing and setting aside the order dated 20.4.2004.

5. This Court, while disposing of writ petition no.4196 of 2004 by order dated 22.6.2004 observed thus :

> " The grievance made before me is that the petitioner had never made the statement as is ascribed to her in the impugned judgment, which reads thus:
>
> "4. .... ..Respondent-wife filed an application Exhibit-61 praying to stop the overnight access of the son to the petitioner husband or in the alternative to hand over the custody of the son to the petitioner."
>
> . It is well settled that if the fact stated in the order of the subordinate court is put in issue, the remedy for the party is to approach

the same court as that cannot be made basis for challenge before the superior court. (See AIR 1982 SC 1249). In the circumstances, the petitioner may take recourse to appropriate remedy before the concerned court, if so advised. Petition dismissed as withdrawn, with liberty as prayed for by the petitioner to approach the Family Court. In the event the petitioner takes out appropriate proceedings before the Family Court, the same be decided in two weeks from the date of presentation of such application. Parties to extend necessary co-operation to the family Court in that behalf.

. At this stage, counsel for the respondent submits that on the basis of the impugned order, the respondent has already made arrangement for the admission of the child in Shardashram School, which school has already commenced from 14th June,2004. Counsel for the petitioner undertakes that till the application is decided by the Family Court and appropriate orders passed, the petitioner shall ensure that the child attends Shardashram School at Dadar on every working day and for that purpose necessary arrangements would be made. Assurance given as stated is accepted.

Ordered accordingly."

6. Against this backdrop, the petitioner filed Interim Application No.98 of 2004, in which the order dated 25.8.2004 came to be passed. It appears that in the meanwhile, by order dated 29.6.2004, the petitioner was directed to immediately hand over the custody of Soham to the respondent in pursuance of the order dated 20.4.2004. The petitioner, accordingly, handed over the custody of her son Soham to the respondent on 1.7.2004 and since then Soham has been in custody of the respondent with the visitation right to the petitioner on every working Saturday between 3.30 to 5.30 pm.

7. I heard the learned counsel for the parties for quite some time. I interviewed the parties and their son Soham in my chamber. With the assistance of the learned counsel appearing for the parties, the futile possibility of amicable settlement between the parties was also explored.

8. Mr Dhakephalkar, learned counsel for the petitioner, invited my attention to the concluding paragraph of Exhibit-61, endorsement made thereunder (Exhibit- C-1) and the orders dated 20.4.2004 and 25.8.2004 and

vehemently submitted that the Family Court has not only misread the prayer made by the petitioner but has committed a manifest error in interpreting it to mean that she consented for handing over the custody of Soham to the respondent. According to him, from the contents of the concluding paragraph in Exhibit-61 application and the petitioner's handwritten endorsement Exhibit-C-1, it is clear that she had, in anguish and desperation, expressed that if the overnight access is not stopped, she would be left with no other option but to hand over Soham to the respondent. He submitted that she never consented for the order dated 20.4.2004, impugned in the present petition. On the other hand, Mr.Bhate, learned counsel for the respondent submitted that the impugned order dated 20.4.2004 was passed by the Court after taking into consideration the prayer made by the petitioner in the Application Exhibit-61 and her handwritten endorsement made thereunder. It was, accordingly to him, a consent order and, therefore, is not liable to be reconsidered by the Court. He further submitted that while making endorsement (Exhibit-61) the petitioner did not show signs of desperation and it was her voluntary act. According to Mr Bhate, the Family Court passed the impugned order after deliberations. He also took me through the impugned orders and submitted

that the Family Court did take into consideration a welfare of Soham before passing both the orders, i.e. orders dated 20.4.2004 and 25.8.2004 and, therefore, they do not deserve to be disturbed by this court in the supervisory jurisdiction under Article 227 of the Constitution of India.

9. Let me make it clear that I am not entering into a question as to who is entitled to have custody of Soham. The writ petition was heard only for a limited purpose as to whether the order dated 20.4.2004 requires to be reconsidered and/or quashed and set aside as was prayed in Interim Application No.98 of 2004, and the earlier arrangement, of two hours access to the respondent be continued. Keeping that in mind, I proceeded to examine the question raised in the writ petition. It is clear from the concluding paragraph of Exhibit-61 that the petitioner, in anguish, had stated that in order to stop the sufferings of Soham and considering a dishonesty of the respondent, stop the overnight access and grant only two hours access to the respondent. She further stated that if that is not possible, then she would be left with no other option but to hand over Soham into the custody of the respondent in order to stop his sufferings. She further made it clear that it would not

mean that she has given permanent custody of Soham to the respondent and that she was unable to look after him. It appears that in the Court she was directed to specify her option in the event of the Court deciding to give custody of Soham to the respondent and in view thereof she made an endorsement (Exhibit C-1) in her handwriting. In Exhibit C-1, she had stated that 'if' the Hon'ble Court takes a decision to give custody to the respondent, then she may be given access of her son on court working Saturdays during the period from 3.30 pm to 5.30 pm in the court building (child complex). She further made it clear that her endorsement (Exhibit C-1) be treated as supplement to her application Exhibit-61. The conjoint reading of the application Exhibit-61 and Exhibit-C-1, in my opinion, shows that the petitioner had prayed for a decision on her request to stop overnight access and if that was rejected, with torment she expressed that to avoid further sufferings of Soham, she would not have any other option but to give custody to the respondent. In my opinion, the Family court misread and/or misconstrued her prayer to hold that the petitioner consented to hand over the custody of Soham to the respondent. The learned Judge simply recorded in the order dated 20.4.2004 that the respondent was ready and willing to take custody of

Soham but not willing to stop the overnight access and then records the further order as quoted above. It is apparent that the learned Judge did not bother to consider her prayer to stop the overnight access. Similarly, when the order dated 20.4.2004 was being reconsidered, the learned Judge once again misread the application Exhibit-61 and C-1, which is evident from the observations made in the order dated 25.8.2004. In so far as the endorsement (Exhbit C-1) is concerned, the learned Judge proceeded to read it to mean that "if custody is handed over to the petitioner-husband, she be provided access from 3.30 pm to 5.30 pm in the children complex and if her mother, father and sister come to take the access that be also provided." As a matter of fact in Exhibit C-1 she had categorically stated that "if Court takes a decision to give custody to the petitioner .... ". Moreover, the learned Judge ought to have read it conjointly with her prayer in the application Exhibit-61. The Court did not even make an attempt to consider her prayer to stop overnight access. After having considered her request, had the Court asked her to make such endorsement and granted custody, the petitioner, probably could not have made any grievance. However, that did not happen. The learned Judges, who dealt with the matter, did not appreciate it in proper

perspective. The word "if" in the Exhibit C-1 clearly meant that her prayer to stop the overnight access and to grant two hours access to the respondent as earlier be considered first and if this Court still holds that the respondent was entitled to have overnight access, then her alternative prayer be considered. Merely because the mother, in anguish, expressed that she cannot bear the sufferings of Soham and, therefore, prayed for stopping of the overnight access or to hand over custody to the respondent did not mean that she gave her consent and the order was akin to a consent order. The learned Judge, in my considered opinion, was wrong in observing that the petitioner intended to offer custody to the respondent and, therefore, the order was passed actually in terms of the statement made by both the parties and that it is akin to a consent order and it is binding on the parties and cannot be reconsidered. It is apparent that the learned Judge has misread and misinterpreted the prayer in Exhibit-61 and Exhibit C-1.

10. In so far as the welfare of the child is concerned, I did not find that either of the parties are disputing that the welfare of the child in the custody of either of them is not protected. The child is presently studying in the school near from the house of the

respondent. Keeping in view the family conditions of both and the age of their parents and considering the observations made by the learned Judge in the impugned order, in my opinion, the welfare of a child would be better protected, if, at this stage, Soham is given in custody of his mother.

11. In the circumstances, this petition is allowed. The impugned orders are quashed and set aside. The respondent is directed to hand over the custody of child Soham to the petitioner on or before 5.1.2005 i.e. during Christmas vacation. The petitioner to continue Soham's kindergarten education in Dr. Radhakrishna Vidyalaya. The petitioner to give access of Soham to the respondent on last Saturday-Sunday of every month starting from Friday evening between 5 pm and 6 pm until Sunday evening between 5 pm and 6 pm. Similarly, on 2nd Sunday of every month the petitioner shall give access of Soham to the respondent between 11 am and 4 pm. During this period, the respondent will be allowed to take away Soham with him. It would be the responsibility of the respondent to pick up Soham from the petitioner's house and drop him there in the evening as aforestated.

12. Keeping in view the peculiar facts and circumstances of the case, the Family Court shall endeavour to dispose of all the four petitions bearing Nos D-41/00, A-798/02, C-29/02, and D-2003 as expeditiously as possible and preferably within a period of nine months from the date of receipt of this order. The petitioner is directed to produce a copy of this order before the Family Court within four weeks from today.

. The rule is, accordingly, disposed of.

. Parties to act on an authenticated copy of this order which may be made available to them.

(D.B.BHOSALE, J.)